MAY THE PLAINTIFF IN A PERSONAL INJURY SUIT BE COMPELLED TO EXHIBIT HIS INJURIES? IF SO, UNDER WHAT CIRCUMSTANCES?

PART I.—AS TO THE EXISTENCE OF THE POWER

IT is everywhere admitted that, with certain restrictions, the plaintiff in a personal injury suit may, if he so choose, exhibit his injuries—either, in proper cases, directly to the jury; or, in other instances, indirectly, to physicians, who are afterwards to go upon the stand. But what about cases where the plaintiff does not so choose? What if, when the defendant, or the court itself, suggests that the plaintiff undergo a physical personal inspection, he objects? May the plaintiff, then, when he does so object, be compelled, against his will, to undergo the examination? Further, in jurisdictions where such power of compulsion is conceded, under what circumstances may the power appropriately be exercised? On these two questions the decisions are irreconcilably at variance. In Part I of this article, will be considered the existence of the power; and, in Part II, the circumstances under which the power may be exercised.

It is to be remarked, at the outset, that no case involving the power in question was decided, either in English or American law, till 1868. At no time in all the centuries from earliest Anglo-Saxon days, in England, and from the beginnings of colonization in America,—so far at least as records shows,—did the question a single time come up. Indeed, in England, as will appear later, it has not arisen even to the present day. Notwithstanding, however, the fact of the extremely late origin of the law on this subject, it will not be wholly unprofitable to go back, and review, very briefly, the early English and American law with regard to other matters which, though very different, are yet to some extent analogous to the subject under discussion, and which may, therefore, be regarded as containing the law upon it in embryo.

And first with regard to the ancient "trial by inspection." This was "when for the greater expedition of a cause, in some point or issue, being either the principal question or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute."[1] This trial by inspection was had in seven classes of

[1] Black. Com. Bk. 3; 331.

cases, namely, to determine the question of majority or infancy, of identity, of idiocy, of mayhem or no mayhem, of trespass for mayhem, of the results of an atrocious battery, and, lastly, concerning circumstances relative to a particular day past. In this last instance inspection was had of the almanac; but in the other classes of cases it was had of the person, and hence the power to order it was in some respects analogous to the power to order an inspection of the plaintiff in a suit for physical injuries.

The next of these ancient matters which present some analogy to the matter in question was the writ *de ventre inspiciendo*. This was a writ at common law, which issued when a widow was suspected of feigning herself with child, "in order to produce a supposititious heir to the estate . . . . In this case, with us, the heir presumtive may have a writ *de ventre inspiciendo* to examine whether she be with child, or not; and, if she be, to keep her under proper restraint till delivered." [1]

In ecclesiastical courts, too, cases arose in which personal inspection was had. These were divorce cases in which the ground alleged for divorce was the sexual incapacity of one of the parties. In such cases it is obvious that the only proof, or disproof, to be had of the alleged physical condition was that to be secured by a physical personal examination.

To these three ancient classes of cases it might be objected that the inspection was of the defendant and not of the plaintiff; and that it was made by the judge, instead of either by the jury or by expert physicians who were to testify upon the stand. And these objections would certainly be true. Says Blackstone: [2] "Where the affirmative or negative of a question is matter for such obvious determination, it is not thought necessary to summon a jury to decide it; who are properly called in to inform the conscience of the court in respect of *dubious* facts; and therefore when the fact, from its nature, must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone." Nevertheless, in spite of these objections, these instances do certainly go to show that physical inspection, as such, was not repugnant to the spirit of the older law. And that is the only purpose for which they are here cited.

However, there was, in the older courts of common law, a rule of evidence which, had it remained unmodified, might have prevented

[1] Black. Com. Bk. 1; 456. [2] Bk. 3; 331, 332.

the issuance of an order by the court for the physical personal examination of a party to a civil action, had a request for such an order been made. I refer to the rule which forbade a party from being examined as a witness upon the compulsion of his adversary. This rule was held to forbid not only the questioning of the party himself upon the witness stand, but also the inspection, either before or after trial, of his books, documents, or papers. Probably, had the question arisen, it would have been held to forbid also an examination of his person.

This rule, however, did not remain unmodified. The common law courts might indeed themselves have modified it, but, with customary obstinacy, they refused to do so. Courts of equity, therefore, with customary liberality, proceeded to effect the modification. Discovery, as they called the proceeding invoked, was not only permitted but compelled, and not only by the interrogation of the party but also by the examination of his books, papers and documents. No doubt, had the question arisen, the power of discovery would have been held to extend even so far as to permit of a physical examination of a party's person. As was said in an early American case, "it was quite within the principle."

This power of discovery was in time assumed by courts of common law, and they proceeded to exercise it in practically the same instances in which it had been exercised by the courts of equity. Then it was conferred upon common law courts, in some of the states, by statute. In this condition of affairs the first case involving the right of the defendant in an action for personal injuries to have personal inspection of his adversary, arose.[1] That was an action for malpractice against Lewis Sayre, a surgeon in New York City, who had operated upon an abscess in the hip of a young girl. It was alleged that Dr. Sayre had inadvertently and unnecessarily opened the capsule of the hip joint and that permanent stiffening of the articulation and some deformity of the limb had followed in consequence. The defendant asked for a physical examination of the plaintiff, a proceeding which the plaintiff resisted. The court granted the order. Said Jones, J. :—

"I am aware there is no recorded case of an application for any such discovery having been granted; but, at the same time, there is no recorded case of any such application having been denied. It is probable no such application was ever made. The reason why it never was cannot be known, but many may be conjectured. Among them, that people are always timorous of taking

[1] Walsh *v.* Sayre, 52 Howard Pr. 334 (1868).

the initiative, especially if the step is likely to subject them to large expense, as a suit in chancery would; therefore, a case of urgent, almost absolute, necessity is requisite to set them in motion. It is probable that no cases of sufficient urgency to overcome this timorousness occurred. Again, at the time of the commencement of the action at law, the subject of which inspection is desired may either have been lost, destroyed, used up, or passed out of the control of the party, or have become so changed by natural or artificial causes, as that an inspection would be of no benefit. Again, as a suit in chancery was of considerable duration, the subject would, in all probability, have become so changed from natural causes that an inspection, when ordered, would be of no avail. Again in a large proportion of cases it may have been considered that the benefit to be derived would not be adequate to the expense.

"A motion similar to the present obviates all these objections, except the second; for the principle being now established it will require but a few days to adjudicate on any particular motion, and the expense is but trifling."

This case, well argued as it is, and important as its holding would seem to be to the cause of justice, is nevertheless not of very great force as an authority. In the first place, the very fact that it stands as the first recorded case upon the question, very materially lessens its value. Again, the court was not a court of last resort. Thirdly,—by far the most important consideration,—the decision was overruled by later cases both in the general term of the supreme court, and in the court of appeals. In the very next case,[1] indeed, in which the question arose squarely, *Walsh* v. *Sayre* was overruled. Said Learned, J. :—

"The order is so unusual that we may well inquire upon what authority of precedent or principle it rests. For precedent the defendant cites, what is called the leading case of *Walsh* v. *Sayre* (52 How. Pr., 334). That case was decided by the special term of the superior court of New York, in 1868, and was reported in 1877. The action was for mal-practice, and the motion by the defendant was that the plaintiff submit to a personal examination by surgeons.

"The opinion states that there is no recorded case of an application for any such discovery having been granted, and the decision is based upon the analogy to discovery in chancery. We see no analogy whatever between the production of books and papers or the examination of a party by a bill of discovery, and the compelling of a party to expose his person to the inspection of physicians."

Further, in the same case, it is said:—

"In *Devenbagh* v. *Devenbagh* (5 Paige, 554) in an action against the wife on the ground of her incurable impotency, the chancellor held that, in such a suit, he had power to compel the parties to submit to a surgical examination; placing the opinion on the ground that, from the very nature of the case, other proof was impossible. But this is a peculiarity, arising in that class of cases, from the necessity of the case. (2 Bishop

[1] Roberts *v.* Ry., 36 N. Y. Supr. 154, 29 Hun 154 (1883).

Marr., sec. 590 [250].) Whatever may be the rule in such actions for divorce, nothing which is there said applies to this case. No such necessity exists. The injuries, if any, suffered by the plaintiff can be proved by ordinary common law evidence; as similar injuries are proved every day.

"The other instances thought by defendant to be analogous, are the trial by inspection and the writ *de ventre inspiciendo*. An examination of 3 Blackstone's Commentary 331, will show that the trial by inspection was a trial by the judges, not by a jury, of some single matter, obvious to sight; except in appeals of mayhem, which are matters long obsolete. No analogy exists between those proceedings and the present.

"The writ *de ventre inspiciendo* (1 Black. Com., 456; taken by the English Law from the Roman Dig. 25, 4, 1, 10, and made indecent in the taking) has long become obsolete. If it shows anything in the present case, its disuse shows that such an invasion of the sacredness of the person, as is here proposed, cannot be permitted at this day."

Yet again:—

"It is undoubtedly true that not infrequently plaintiffs suing for bodily injuries, do exhibit in court the injured part. Nor do we know of any reason why they should not do this; notwithstanding the exhibition may excite sympathy. And, on the other hand, all unreasonable concealment of any injured part (not justified by any dictate of modesty or otherwise) may excite a doubt in the mind of the jury as to the genuineness or extent of the alleged injury. But we cannot admit the principle that, either in the presence of the jury, or in a presence of a referee, a party can compel his opponent to exhibit his body in order to enable physicians to examine and question and testify.

"Section 834 of the Code, forbidding a physician to testify to information obtained while attending a patient, necessary to enable him to act, is not strictly applicable to the question now under consideration. But if the law will not permit a physician, voluntarily consulted, to reveal what he has learned, can it be that the law will compel a party to reveal, by exposure of the body and by answers to questions, facts to a physician, to which he may afterwards testify in court?

"There may be danger that in actions of this nature plaintiffs will exaggerate the injuries they have received; and that defendants may be at a disadvantage in ascertaining the exact truth. But this evil is far less than the adoption of a system of bodily, and perhaps immodest, examinations, which might deter many, especially women, from ever commencing actions however great the injuries they had sustained."

Next the question arose twice[1] in the superior court of the city of New York, and in both cases the decision was against the existence of the power.

At last the matter came up in a case[2] in the court of appeals.

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[1] Neuman *v.* Third Avenue R. R. Co., 50 N. Y. Super. Ct. 412 (1884); Archer *v.* Sixth Avenue R. R. Co., 52 N. Y. Super. Ct. 378 (1885).

[2] McQuigan *v.* Ry., 129 N. Y. 50 (1891).

If the question had been in doubt in New York before, this case was decisive. No other question was presented for decision, and a full and exhaustive opinion was written. It was held in the clearest of language that the power to compel the plaintiff in a suit for personal injuries to submit to a physical examination did not exist. Said Andrews, J.:—

"Upon the organization of our state government, our courts succeeded to the powers theretofore exercised by the courts of law and chancery in England, so far as they were applicable to our situation. *It is a significant fact that not a trace can be found in the decisions of the common law courts of England, either before or since the Revolution, of the exercise of the power to compel a party to a personal action to submit his person to examination at the instance of the other party.*[1] If the power exists it is difficult to suppose that it would not have been frequently invoked. Actions for assault and battery, for injuries arising from negligence, and generally for personal torts, were among the most common known to the law and yet, so far as we can discover, in no case was it supposed or claimed that the court was armed with this jurisdiction. The non-exercise of the power is not conclusive against its existence, but it is strange if the power in question existed, it should have been unused for centuries and never have been called into activity."

This reasoning, as will be seen, is precisely the opposite to that of Jones, J., in the case of *Walsh* v. *Sayre*. Which reasoning is the better, it is not necessary here to consider. The law as to the point in question in New York, so far at least as the common law was concerned, was definitely settled.

In 1893, however, the common law was changed by statute,[2] and the principle laid down in *Walsh* v. *Sayre* was made operative. The statute runs:—

"In every action to recover damages for personal injuries, the court or judge in granting an order for the examination of the plaintiff, before trial, may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination by one or more physicians or surgeons, to be designated by the court or judge, and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper. In every action brought to recover damages for personal injuries, where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court or judge shall order that such physical examination be made."

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[1] This passage is not italicized in the original. It is so treated here because it tends to confirm the statement made near the beginning of this article with regard to the extremely late origin of the law upon the matter under discussion.

[2] Laws of 1893, Chap. 721. This statute would seem to be the only one ever passed, dealing expressly with the power in question.

In the case of *Lyon* v. *Manhattan Ry. Co*,[1] this statute was held to be constitutional. One case decided *since* the passage of the statute, but not *under* the statute for the reason that the trial in the lower court took place two years before the statute was passed, affirmed the principle previously supported by the weight of authority in New York.[2]

Thus much attention has been devoted here to the law in New York because it was in that state that the question arose first and also because it is in that state that the question has arisen most frequently and been most thoroughly discussed. Law on the point, however, has been making in other states.

In Illinois the right is denied. The question first arose, or was said to have arisen, in *Parker* v. *Enslow*.[3] In reality the opinion in this case does not clearly seem to have been necessary to the decision; and, moreover, no authorities whatever are cited. Still further, the opinion is scanty and arbitrary. All that is said, is as follows:—

"Complaint is also made that the court refused to compel appellee to submit his eyes to the examination of a physician in the presence of the jury. There was no error in this. The court had no power to make or enforce such an order."

In the next case touching upon the subject,[4] the question under discussion is not squarely passed upon, but the existence of the power is hinted at in the following terms:—

"As we view the case it seems quite unnecessary for us to express any opinion upon the general question as to whether, under proper circumstances, and where it is shown by satisfactory proof that the due administration of justice requires such action, a court may not have the power to compel a plaintiff, in an action for a personal injury, to submit to such personal examination as may be necessary for the purpose of furnishing reliable and satisfactory evidence of the nature, extent and permanency of the injury complained of."

In *Joliet St. Ry. Co.* v. *Call*[5] the question came up squarely, and was decided in the negative. The force of the opinion, however, is weakened by the fact that the two Illinois cases therein mentioned are cited apparently without knowledge that, in both

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[1] 142 N.Y. 298 (1894). Other cases arising under this statute: Green *v.* The Middlesex R. Co. 10 Misc. 473 (1894); Bowe *v.* Brunnbauer, Super. Buff., 13 Misc. 631 (1895); Moses *v.* Newburgh Ry. Co., 91 Hun 278 (1895); Lawrence *v.* Samuels, 16 Misc. 501 (1896).

[2] Cole *v.* Fall Brook Coal Co., 53 N. E. 670, 159 N. Y. 59, 87 Hun 584 (1899).

[3] 102 Ill. 272 (1882).

[4] St. Louis Bridge Co, *v.* Miller, 138 Ill. 465 (1891).

[5] 143 Ill. 177 (1892).

those cases, the decision of the question was not necessary to the decision of the case. However, in *P. D. & E. Ry. Co.* v. *Rice*[1] the question again arose squarely and was again decided adversely to the existence of the claimed power. So that the matter may now be regarded as definitely settled in Illinois in the negative. It is worth mentioning that in 1895 the question arose in the Illinois court of appeals;[2] and was, of course, decided in accordance with the precedents established in the supreme court of the state of Illinois.

In Texas, in the supreme court, though the question has been discussed very frequently, and has often only narrowly missed coming up for direct decision, it has never yet[3] been really decided. So, too, in the Texas Civil Appeals, the question has frequently been discussed, without, except in two cases, its having been necessary to the decision. In the two cases in which it was unquestionably necessary to the decision, it was held that the power did not exist.[5]

In Delaware the question has once arisen,[6] and, in some sense, been decided. In the lower court, it was the plaintiff, at the outset, who wished to exhibit his injuries to the jury, and it was the defendant who objected. At the noon recess, the attorneys for the two parties got together and agreed that the plaintiff should be examined by a physician during the recess. Three physicians, selected by the defendant, then proceeded to examine the plaintiff. Afterwards, when one of these physicians was testifying, the counsel for the defense asked the court to compel the plaintiff to exhibit his leg, (the part injured) to the jury; and it now was the plaintiff, in his turn, who objected. The court refused to compel the plaintiff to exhibit. In the higher court all there was of the opinion was this:—

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[1] 144 Ill. 227 (1893).

[2] C. B. & Q. Ry. *v.* Reith, 65 Ill. App., 461 (1895).

[3] I. & G. N. Ry. Co. *v.* Underwood, 64 Texas 463 (1885); Mo. Pac. Ry. Co. *v.* Johnson 72 Texas 95 (1888); Gulf, Colorado & Santa Fe Ry. Co. *v.* Norfleet, 78 Texas 321 (1890); Chicago, Rock Island & Texas Ry. Co. *v.* Langston, 92 Texas 709 (1899).

[4] Gulf C. & S. F. Ry. Co. *v.* Nelson, 24 S. W. 588, 5 Texas Civ. App. 387 (1893); Houston & T. C. Ry. Co. *v.* Berling, 37 S. W. 1083, 14 Texas Civ. App. 544 (1896); C., R. I. & T. Ry. Co. *v.* Langston, 19 Texas Civ. App. 568, 47 S W. 1027 (1898).

[5] Ft. Worth Ry. Co. *v.* White, 51 S. W. 855 (1899); Galveston, H. & S. A. Ry. Co. *v.* Sherwood, 67 S. W. 776 (1902).

[6] Mills *v.* Wilmington City Railway Co., 1 Marvel 269 (1894).

"*Per curiam.*—We think that we have no power to compel the plaintiff to submit to an examination."

Under the circumstances, this case decides but little, perhaps is entirely obiter; and it is here cited merely because it is the only case in which the point in question has ever been even nominally passed upon in the state of Delaware.

In Massachusetts only one case[1] has arisen, and in that case it is said (expressly obiter) that the power does not exist. Holmes, C. J.:—

"It will be seen that we put our decision not upon the impolicy of admitting such a power, but on the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case."

The Federal Courts have held adversely to the power. In *Union Pac. Ry. Co.* v. *Botsford*[2] the question arose first, and the decision was placed upon a ground somewhat different from those upon which the decisions already considered were given. Said Justice Gray:—

"The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country."

Speaking of the history of the matter, he says:—

"So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history.

"The most analogous cases in England, that have come under our notice, are two in the Common Bench, in each of which an order for the inspection of a building was asked for in an action for work and labor done thereon, and was refused for want of power in the court to make or enforce it. * * *

"In the English Common Law Procedure Act of 1854, enlarging the powers which the courts had before, and authorizing them, on application of either party, to make an order 'for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute,' the omission to mention inspection of the person is significant evidence that no such inspection, without consent, was allowed by the law of England. Taylor on Evidence, 6th ed. secs. 502–504.

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[1] Stack *v.* New York, N. H. & H. R. Co., 177 Mass. 155, 58 N. E. 686 (1900).

[2] 141 U. S. 250 (1891).

"Even orders for the inspection of documents could not be made by a court of common law, until expressly authorized by statute, except when the document was counted or pleaded on, or might be considered as held in trust for the moving party. Taylor on Evidence, Secs. 1588-1595; 1 Greenleaf on Evidence, Sec. 559."

Justices Brewer and Brown, though citing no precedents, have a well-reasoned dissenting opinion in this case, which somewhat lessens its value as an authority. However, in a case which appears to be the only other ever decided in a federal court, *Ill. Central Ry. Co.* v. *Griffin*,[1] the view of the majority in *Union Pacific Ry. Co.* v. *Botsford* is followed.

So much for the courts holding that the power does not exist. When we turn to the courts which hold that it does exist, we find the authorities more numerous.

It is chiefly in the West and South that the power is upheld—in Ohio, Alabama, Georgia, Kentucky, Missouri, Kansas, Arkansas, Michigan, Indiana, Wisconsin, Minnesota, Iowa and Washington.

In Ohio, the power has been sustained, five propositions being laid down governing its exercise.[2]

In Alabama, too, the power has been sustained, five propositions being again laid down governing its exercise.[3]

In Michigan, also, one case in point has arisen. In that case the power was sustained.[4]

In Indiana, it was long held that the power did not exist. In the first two cases,[5] the opinion, as to the point in question, is entirely obiter. The opinion in the first case,[6] that bears directly on the matter before us, is so brief and to the point that it is here quoted *in extenso*. Coffey, C. J.:—

"There is no statute in this state conferring upon the circuit court the power to make such an order as was asked in this case. If such power exists, it is a power that inheres in the court, independent of any statutory provision. It is applicable alike to all, male and female, and is confined to an examination of no particular part of the person. To say that the power rests in the sound discretion of the court does not meet the case, for the real question is as to whether the power exists at all. So far as we know, the courts of this State have never attempted to exercise such a power, and we are of the

[1] 53 U. S. Appeals, 22 (1897).

[2] Miami & Montgomery Turnpike Co. *v.* Baily, 37 Ohio St. 104 (1881).

[3] Ala. Grt. Southern Ry. Co. *v.* Hill, 90 Ala. 71 (1889).

[4] Graves *v.* City of Battle Creek, 95 Mich. 266 (1893).

[5] Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 126; Railroad Co. *v.* Brunker, 128 Ind. 542, 26 N. E. 178.

[6] The Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401 (1891).

opinion that no such power is inherent in the courts. We think the better reason is against the existence of such a right, and, in the absence of some statute upon the subject, we do not think the courts should attempt to compel litigants, against their will, to submit their persons to the examination of strangers, for the purpose of furnishing evidence to be used on the trial of a cause. Should a litigant willingly submit, there could be no legal objection to such an examination, and should he refuse to submit to a reasonable examination, his conduct might possibly be proper matter for comment. But this is quite a different matter from compelling him, against his will, to submit his person to the examination of strangers."

In the most recent Indiana case,[1] however, *Pennsylvania Co.* v. *Newmeyer* is distinctly overruled, the question being squarely before the court, and the court expressly following *Graves* v. *City of Battle Creek*,[2] and the dissenting opinion in *Union Pacific Ry.* v. *Botsford*.[3] Said Hadley, J.:—

"Upon further, and perhaps fuller, consideration of the question, we are satisfied that the decision in the Newmeyer case, upon this point, is refuted by the great weight of authority, and it is therefore disapproved."

In another Indiana case, *The Cleveland, C. C. & St. L. Ry. Co.* v. *Huddlestone*,[4] a question arose which, though it is not precisely the one under discussion, is yet so nearly akin to it, and so particularly liable to be mistaken for it, that the case must assuredly have much interest in this connection. A train, leaping from a track, ran into a telegraph office and injured an operator, dislocating one of his kidneys and producing, as was claimed, "the secreting of albumen and sugar in the urine." A motion was made that the court order the plaintiff to produce, at or in advance of trial, specimens of his urine for analysis and examination. The lower court overruled the motion. The upper court held the ruling error, Said Howard, J,:—

"The ruling of the court, it seems, was based upon decisions of this and other courts denying the right of a court to subject a party to an examination of his person for the purpose of enabling the adverse party to secure desired evidence. Such an examination is held to be an invasion of the right of the person—an indignity to which, in the absence of a positive statute, no one should be subjected against his will. . . . But urine which has passed from the body is no part of the person. It is a lifeless substance, separated forever from the individual, and it can be no more indignity to his person, to subject such substance to examination and analysis, than it would be to require a like examination of the cast-off clothing of the same individual."

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[1] City of South Bend *v.* Turner, 60 N. E. 271, 156 Ind. 418 (1901).

[2] Cited *ante*, 95 Mich. 266, 54 N. W. 757.

[3] Cited *ante*, 141 U. S.250 (1891).

[4] 46 N. E. 678 (1897).

In Kansas, the question has arisen twice. In *Atchison, Topeka & Santa Fe Rd. Co.* v. *Thul*,[1] Valentine, J., said:—

"As before stated, we think the court below, in refusing to make any order in the present case, did so solely upon the grounds that such a practice is unknown to the law, and that the court had no power to enforce such an order. In this we think the court below was mistaken."

This case cites, very approvingly and very fully, the leading case of *Shroeder* v. *C. R. I. & P. Ry. Co.*, to be discussed later and at some length among the Iowa cases.

In *Southern Kansas Ry. Co.* v. *Michaels*,[2] the existence of the power was taken for granted; though, for reasons appearing in the special case, permission to exercise the power was withheld.

In the Minnesota reports occur three cases. The first, *Hatfield* v. *St. Paul & Duluth Ry. Co.*,[3] was somewhat peculiar. The court was requested by the defendant's attorney to direct the plaintiff to walk across the court-room in the presence of the jury, in order that they might be better able to determine the extent of her alleged lameness and limping. The court declined to do this, and the defendant excepted. Said Mitchell, J.:—

"In an action for personal injuries the court has the power in a proper case, and under proper circumstances, to require the plaintiff to perform a physical act in the presence of the jury that will show the nature and extent of the injuries."

The judge placed his decision on the ground of analogy with actions in other branches of the law—inspection of real estate and personal property, and of allowing tests to be made before the court in patent and equity cases. He adverts to the "common practice" of allowing "plaintiffs in actions for personal injuries to exhibit to the jury their wounds in order to show their extent, or to enable a surgeon to demonstrate their nature and character." Such practice, he says, having been held proper, it should certainly also be held proper to permit the inspection by the jury of a physical act performed by the plaintiff at the instance and suggestion of the defendant.

In *Wanek* v. *City of Winona*,[4] the facts are so typical, the position taken is so decided, and the opinion is so well reasoned that the case is here quoted from largely. Mitchell, J,:—

"The trial court denied the application upon the grounds, as shown by his memorandum: First, that he had no power in any case to order a party to

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[1] 29 Kans. 466 (1883).

[2] 57 Kans. 474 (1896).

[3] 33 Minn. 130 (1885).

[4] 80 N. W. 851, 78 Minn. 98 (1899).

submit to a physical examination of his person; and second, even if he had the power, he would, in the exercise of his discretion, have refused, under the circumstances of the case, to grant defendant's application.

"1. We are very clearly of the opinion that the court has the power, in a case of this kind, to order the plaintiff to submit to a physical examination of his person. We shall not go into any extended discussion of a question which has been so much and so often discussed by courts and text-writers. Upon both principle and reason we are of opinion that in a civil action for physical injuries, where the plaintiff tenders an issue as to his physical condition, and appeals to the courts of justice for redress, it is within the power of the trial court, in the exercise of a sound discretion, in proper cases, upon application reasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection, and to require the plaintiff to submit to it under the penalty of having his action dismissed in case he refuses to do so. We are aware that there are some eminent authorities to the contrary, but with all due deference to them, we cannot avoid thinking that they base their conclusion upon a fallacious and somewhat sentimental line of argument as to the inviolability and sacredness of a man's person, and his right to its possession and control, free from all restraint or interference of others. This, rightly understood, is all true, but his right to the possession and control of his person is no more sacred than the cause of justice. when a person appeals to the State for justice, tendering an issue as to his own physical condition, he impliedly consents in advance to the doing justice to the other party, and to make any disclosure which is necessary to be made in order that justice may be done. No one claims that he can be compelled to submit to such an examination, but he must either submit to it, or have his action dismissed. Any other rule in these personal injury cases would often result in an entire denial of justice to the defendant, and leave him wholly at the mercy of the plaintiff's witnesses. In very many cases the actual nature and extent of the injuries can only be ascertained by a physical examination of the person of the injured party. Such actions were formerly very infrequent, but of late years they constitute one of the largest branches of legal industry, and are not infrequently attempted to be sustained by malingering on the part of the plaintiff, false testimony, or the very unreliable speculations of so-called 'medical experts.' To allow the plaintiff in such cases, if he sees fit to display his injuries to the jury, to call in as many friendly physicians as he pleases, and have them examine his person, and then produce them as expert witnesses on the trial, but at the same time to deny to the defendant the right in any case to have a physical examination of plaintiff's person, and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice, too gross, in our judgment, to be tolerated for one moment."

Some of the facts in this case were such as to render the opinion particularly valuable. Such facts were these:—

"A day or two after the accident, the plaintiff's wife, at her husband's request, called on one of the city aldermen and requested him to send the city physician to see and treat the plaintiff at the city's expense. The alderman, having ascertained that the city physician was absent from the city, requested

Dr. Keyes to do so in his place. Dr. Keyes did so, and attended and treated the plaintiff for some time, and during such treatment examined his person two or three times. . . . Plaintiff, having become dissatisfied with Dr. Keyes' treatment, discharged him, and employed another physician, since deceased. Subsequently—the exact date does not appear, but presumably after plaintiff had served notice of his claim against the city,—the city attorney, accompanied by Dr. Keyes, came to plaintiff's house, and demanded that he submit to another examination, which he declined to do. The above is the only opportunity the defendant has ever had of examining the plaintiff's person."

It will be observed that the city had already, at least to a certain extent, had the privilege of examining the plaintiff, and yet a further examination was permitted.

In *Wittenberg* v. *Onsgard*,[1] an order for further examination of the plaintiff by means of X rays, *after the physician who had used the rays had burned the plaintiff's neck with them*, was denied, but the power to order physical examination in general was not denied. It was only the order for further examination under the peculiar circumstances. The case is relevant rather to the question which forms the subject of the second part of this paper—namely, that dealing with the circumstances under which the power may be exercised—and it is cited at this point merely because the power itself would, at first blush, seem to have been denied in it.

In Wisconsin there are two cases. In *O'Brien* v. *City of La Crosse*,[2] the power, though its exercise was refused under the peculiar circumstances, much as in the Minnesota case last cited, was nevertheless assumed to exist.

In *White* v. *Milwaukee City Ry. Co.*,[3] the naked question of the power itself arose, and the power was sustained. Said Lyon, J.:—

"The testimony of the plaintiff and some of her witnesses tends to show that at the time of the trial she had not recovered from the effects of her injuries; that her limb was not then in a normal condition; and that the effect of such injuries would, or might be, permanent. She testified that five physicians had examined her limb, among whom was Dr. Hare. During the trial, counsel for the defendant made the following request, and the following proceedings were thereupon had: *Defendant's counsel:* 'We ask of the court to direct the plaintiff, who is now present, to submit her limb for examination in a private room attached to this court-room, privately, to Drs. Senn and Hare, who are now present, and that if she wish she can be accompanied by any of her own female friends who are present, or any other physician whom she chooses.' *Court:* 'I do not see anything improper in the request, but I do

[1] 81 N. W. 14, 78 Minn. 342 (1899).

[2] 75 N. W. 81, 99 Wis. 421 (1898).

[3] 61 Wis. 536 (1884).

not think I have any authority to compel a suitor to submit, in a case of this kind, to any examination against his or her will. I therefore refuse the application.' Defendant excepts. Plaintiff's counsel says: 'The plaintiff herself declines to have the examination in the absence of her physician, who, as her attorney is informed and believes, has left the city since he has been on the witness stand.'

"It will be seen that the court denied this request on the sole ground that he had no authority to compel the plaintiff to an examination against her will. On principle and authority we are satisfied that this was error. . . .

"It is said by the learned counsel for the plaintiff, that it rests in the sound discretion of the court to order, or refuse, an examination. Perhaps it does. But that discretion has not been exercised here. The court expressly denied the application because of alleged want of power to grant it. We hold that in a proper case the court has power to order an examination, and that this is a proper case in which to exercise it."

In Nebraska the question has never arisen squarely. It has, however, been discussed obiter three times.[1] In all of these discussions the power was held, or asserted, to exist.

In Kentucky the power was asserted to exist, on the ground that it was implied by the "best evidence" rule;[2] but the force of this case as an authority is much weakened by the fact that the holding of the lower court was affirmed "on the ground that there was no real dispute about the ankle." In the next Kentucky case,[3] however, the question of the power was squarely before the court, and the power was very clearly upheld.

In Georgia the power was sustained because of a provision of the Code to the effect that "every court has power . . . to control in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto."[4] This case is the only one in any state upholding the power under a statute not dealing in terms with it.

In Missouri, the first case arose in the court of appeals.[5] In that case the power was held to exist. In the next case, *Loyd* v. *Hannibal & St. Joseph Ry. Co.*,[6] the opposite was held. Said Napton, J.:—

"The proposal to the court to call in two surgeons and have the plaintiff examined during the progress of the trial, as to the extent of her injuries, is unknown to our practice and to the law."

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[1] Ry. *v.* Finlayson, 16 Neb. 578 (1884); Stuart *v.* Havens, 17 Neb. 211 (1885); City of Chadron *v.* Glover, 43 Neb. 732 (1895).

[2] Belt Elect. L. Co. *v.* Allen, 44 S. W. 89 (1898).

[3] Louisville & N. R. Co. *v.* Simpson, 64 S. W. 733 (1901).

[4] Richmond, etc. Ry. *v.* Childress, 82 Ga. 719 (1889).

[5] 2 Mo. Appeals Rep'r. 1019. [6] 53 Mo. 509 (1873).

In *Shepard* v. *Missouri Pacific Ry. Co.*,[1] however, the opinion in *Loyd* v. *Hannibal & St. Joseph Ry. Co.* is disapproved. In *Sidekum* v. *Wabash Ry.*,[2] the power is assumed to exist, and again in *Owens* v. *Kansas City Rd. Co.*[3] In *Norton* v. *St. Louis & Hannibal Ry. Co.*,[4] the power is sustained obiter. In *Fullerton* v. *Fordyce*,[5] the existence of the power is again assumed. Last, and most important of all the Missouri cases is *Haynes* v. *Trenton*.[6] The particular value of this case arises both from the fact that the question was unmistakably necessary to the decision of the case, and from the further fact that the circumstances under which the question arose in the lower court were such as to make, logically speaking, against the existence of the claimed power. This exercise of the power, sustained by the higher court under such circumstances, makes the law more unquestionably settled in Missouri. What these facts were will appear by the following extract from the opinion. Macfarlane, J.:—

"After plaintiff had shown his leg to the jury on this trial, and evidence had been offered tending to prove that the injuries were greater than they appeared on the former trial to have been, defendant, as a part of his cross-examination of plaintiff, asked that the physicians, who had previously examined the leg, might be permitted to make a further examination and give their opinion as to its condition, as compared with that when previously examined. This request the court refused, and in doing so we think it committed reversible error."

Hence, it would seem that, in Missouri, the court not only has power, under proper circumstances, to compel the plaintiff to submit to a physical examination, but that it also has power, when at a second trial it is claimed that the injuries have become greater, to order a physical examination for the purpose of ascertaining the nature and extent of the increase.

In Arkansas the matter is clearly settled by *Sibley* v. *Smith*,[7] the decision of the question having been undoubtedly necessary to the decision of the case, the opinion being well reasoned, and several cases from other states having been cited.

In *Railway Co.* v. *Dobbins*,[8] the power is taken for granted.

In Iowa the power has been upheld in two strong cases. The first, *Shroeder* v. *C. R. I. & P. Ry.*,[9] already referred to, was

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1 85 Mo. 629 (1885).
2 93 Mo. 400 (1887).
3 95 Mo. 169 (1888).
4 40 Mo. Appeals 642 (1890).
5 121 Mo. 1 (1893).
6 123 Mo. 326 (1894).
7 46 Ark. 275 (1885).
8 60 Ark. 481 (1895).
9 47 Ia. 375.

decided in 1877—a rather early date considering that the first decided case on the subject, in any jurisdiction, was in 1868. As this case has been frequently cited in later cases, and has apparently had much to do with the formation of law upon the subject, the privilege is here taken of going into it in some detail. An employe of the railway alleged that, by the negligence of the defendant, he was thrown from a car, a load of lumber immediately afterward falling upon him. He alleged further that his hip and back were the seats of great pain, that the injuries had impaired his nervous system, and that his legs and various internal organs were more or less paralyzed. The defendant asked for an order requiring an examination by physicians who were to be selected in equal numbers by the plaintiff and the defendant; the defendant's own medical officer to be one of the examiners, and the expenses to be paid by the defendant. The application was resisted and overruled. This decision was reversed in the supreme court.

Said Beck, J.:—

"Whoever is a party in an action in a court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice. This right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action . . . . . It is true, indeed, that on account of the imperfections incident to human nature, perfect truth may not always be attained, and it is well understood that exact justice cannot, because of the inability of courts to obtain truth in entire fullness, be always administered. . . . . Great progress, however, in a comparatively recent period has been made, by legislation and judicial decisions, in the work of conforming the system of evidence to this germinal principle. The most notable of the steps in this progress is the abrogation of the rule which precluded parties to actions from giving testimony therein. . . . The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it. . . .

"But it is urged that the court was clothed with no power to enforce obedience of plaintiff, had such an order been made. Its power, in our judgment, was amply sufficient to coerce obedience. The plaintiff would have been ordered by the court, by submitting his person to examination, to permit the introduction of testimony in the case. His refusal would have been an impediment to the administration of justice, and a contempt of the court's authority. He would have been subject to punishment as a recusant witness who refused to answer proper questions propounded to him. Should such recusancy too long delay the court, or prove an effective obstruction to the progress of the case, the court could have stricken from the pleadings all the allegations as to permanent injury, and withdrawn from the jury that part of the case. The plaintiff by voluntarily withdrawing his claim for such injury would have been relieved from the necessity of submitting to the examination,

and proceedings as for contempt would have been suspended. When it is remembered that plaintiff was a witness before the court, that the examination of his person would have had the effect to elicit testimony from him, as upon a cross-examination, the power of the court over him will be readily understood.

"It is said that the examination would have subjected him to danger of his life, pain of body and indignity to his person. The reply to this is that it should not, and the court should have been careful to so order and direct. Under the explicit directions of the court, the physicians should have been restrained from imperilling, in any degree, the life or health of the plaintiff. . . . . As to indignity to which an examination would have subjected him, as urged by counsel, it is probably more imaginary than real. An examination of the person is not so regarded when made for the purpose of administering remedies. Those who effect insurance upon their lives, pensioners for disability incurred in the military service of the country, soldiers and sailors enlisting in the army and navy, all are subjected to rigid examination of their bodies, and it is never esteemed a dishonor or indignity. The standing and character of the physicians who should have been appointed to make the examination would not only have secured plaintiff from insult and indignity, but would have been a guarantee that nothing would have been attempted which would have endangered his life or health.

"We have been able to find no case[1] in which the question before us has been considered, and we have been referred to no authority by counsel that seems to have much application thereto. The courts have held in divorce cases, when the impotency of the party is in question, an examination may be ordered of the person alleged to be impotent. See 2 Bishop on Marriage and Divorce, sec 590, *et seq.*, and notes. The foundation of this rule is the difficulty of reaching the truth in any other way than by an examination of the person. The authorities referred to may be regarded as giving some support to our conclusion.

"It is the practice of the courts of this state, sanctioned by more than one decision of this court, to permit plaintiffs who sue for personal injuries to exhibit to the jury their wounds or injured limbs, in order to show the extent of their disability or suffering. If, for this purpose, the plaintiff may exhibit his injuries, we see no reason why he may not, in a proper case and under proper circumstances, be required to do the same thing for a like purpose upon the request of the other party. If he may be required to exhibit his body to the jury, he ought to be required to submit it to examination of competent professional men.

"The court instructed the jury that they were authorized to regard plaintiff's refusal to submit to an examination as an admission that the examination, if made, would have been against his interest in the suit. It is argued that this familiar rule of law would alone relieve defendant from the effect of prejudice on account of the refusal of plaintiff to be examined. This position is not correct. The defendant is left to depend upon the inference of the jury, which might or might not have been exercised, instead of having the truth disclosed

[1] The learned justice probably means no case in the Iowa court. Loyd *v.* Hannibal & St. Joseph Ry. Co. (Mo.) was decided in 1873, Walsh *v.* Sayre (N. Y.) was decided in 1868; but was not reported till 1877.

by direct and positive evidence. The law will not require it to depend upon such inferences where it can afford the means of producing competent evidence upon the question in issue."

In another Iowa case, *Hall* v. *Incorporated Town of Manson*,[1] not only was the question squarely before the court and squarely decided, but a somewhat peculiar phase of the question was presented. Doctors for each side had testified, and disagreed, as to the mere measurements of an injured foot and ankle. The defendant insisted that the parts be measured before the jury. The plaintiff did not object, but the court overruled the application on its own motion. The supreme court, however, held that the measurement should have been made.

Each of the cases thus far cited on either side of the question, has been individually commented upon at the time when cited; yet nevertheless it may not be improper, at the present point, to attempt to balance the two groups into which the cases fall, and so to come to some conclusion as to the weight of authority in the country as a whole. Indubitably opposed to the power, are found the courts of New York and of Illinois. In Texas, the supreme court has never decided the question, the only recorded cases in which the question has arisen in that state as necessary to the decision having been in the court of appeals. In the Federal courts the supreme court has one case denying the power, with two judges dissenting; the circuit court of appeals one case denying it with no judges dissenting. Allowing, now, upon the one hand, the great weight properly to be accorded to the authority of the New York courts, and, upon the other, a proper deduction for the fact that, in New York, the whole matter has recently been reversed by legislation, it would seem hardly to be denied that the weight of authorities against the power is not by any means so great as that in favor of it, considering, as we must, in favor of the power, the courts of Ohio, of Indiana, of Michigan, of Kentucky, of Alabama, of Georgia, of Kansas, of Arkansas, of Iowa, of Missouri, of Wisconsin, and of Minnesota. And in the latter class of cases, no mention whatever is made of certain states, such as Nebraska, in which the power apparently would be sustained, but in which the decisions are either all obiter, or else have been rendered by none but inferior courts.

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[TO BE CONTINUED.]

[1] 68 N. W. 922. (1896).